# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 17, 2016 |
| v | No. 325552<br>Muskegon Circuit Court |
| MICHAEL DAVID HOLMAN,<br><br>Defendant-Appellant. | LC No. 14-065237-FH |

Before: O'BRIEN, P.J., and K. F. KELLY and FORT HOOD, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (sexual penetration with a person under 13 years of age), and one count of second degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 33 to 52 years' imprisonment for the CSC-I convictions and 9 to 30 years' imprisonment for the CSC-II conviction, with the terms running concurrently. Finding no errors warranting reversal, we affirm.

## I. BASIC FACTS

The victim was nine years old at the time of trial. Defendant was the boyfriend of the victim's mother, Danielle Kinney. Defendant lived with the victim and her family between August 2012 and January 2013. During that time, the victim's family lived in a number of places, including with Lucinda Wyckoff, whom the victim referred to as "Grandma Cindy," and her son, Don Rodgers, whom the victim called "Daddy Don."

The victim testified that during the time when she was between six and seven years old, defendant touched her "private area where I pee" with "his tongue, his hand and his private part." Defendant used his fingers and touched her on top of and underneath her clothing on the "outside" of her privates. This occurred at Aunt Michelle's[1] house but did not happen at Aunt

[1] Michelle Smith is defendant's sister.

Bernie's house.[2] The victim could not specifically recall the location where the touching took place, but it was in one of those places that she had lived. Defendant also put his tongue "where I go pee" underneath her clothes and outside her privates while at Michelle's house. The victim testified that, on one occasion, defendant "tried to get it in me," which the victim referred to as his private. When he "tried to stick it in my lips" (meaning her labia), "I slapped him . . .[b]ecause it hurt." During cross-examination, the victim testified that the first person she told about what defendant did to her was her mother.

The victim testified that she went to the Child Advocacy Center (CAC) on two separate occasions. She admitted that she did not reveal the abuse the first time she went to the CAC because she "was scared to say. I didn't know what [the interviewer] was gonna do so I was scared." The victim testified that she told the truth during the second interview and that she was telling the truth in court.

Kinney testified that at a January 19, 2013 bonfire at Wyckoff's home, the victim told Kinney about the abuse. The victim told Kinney that she could "finally tell the truth" and that she was "not scared" and that defendant "was touching her." The victim revealed that defendant was "touching her and he tried to stick his peepee inside of her." Kinney testified that defendant paid far more attention to the victim than to Kinney's other children.

Defendant testified at trial and denied the allegations. He described the victim as starved for attention and "just pretty much up my butt 24/7."

The trial court summarized the testimony and concluded that the victim's testimony was more credible than defendant's. It concluded that the victim's testimony "augmented by the other folks who have testified in the prosecutor's case" proved the allegations beyond a reasonable doubt.

Defendant filed his claim of appeal on January 12, 2015. In his appellate brief, defendant requested that the matter be remanded for a *Ginther*[3] hearing regarding trial counsel's failure to object to Kinney's testimony regarding the bonfire incident. Specifically, defendant argued that Kinney's testimony was not admissible as a tender years exception under MRE 803A because the prosecutor failed to give notice and because the victim's statement was not spontaneous. This Court granted defendant's motion. *People v Holman*, unpublished order of the Court of Appeals, entered October 23, 2015 (Docket No. 325552).[4]

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[2] Bernadette Stover is the victim's maternal aunt.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[4] Defendant subsequently filed a Standard 4 Brief and requested that the matter be remanded for an evidentiary hearing so that additional ineffective assistance of counsel issues could be explored. This Court denied defendant's motion. *People v Holman*, unpublished order of the Court of Appeals, entered December 18, 2015 (Docket No. 325552).

At the *Ginther* hearing, defendant's appellate counsel moved for a new trial, indicating that this case was a credibility contest between the victim and defendant and that trial counsel's failure to object to improper hearsay evidence and, worse yet, introducing the evidence herself, fell below the objective level of competency because Kinney's testimony bolstered the victim's accusations. Counsel also argued that the evidence would not have been admissible as a prior consistent statement when there was no allegation of recent fabrication.

Following the *Ginther* hearing, the trial court noted that the victim's statement to Kinney was probably inadmissible under the tender years exception, but that trial counsel had a sound trial strategy in referring to the bonfire incident and later failing to object to Kinney's testimony. The trial court further noted that, even if counsel was ineffective, there was no prejudice because the issue of credibility was not even a close call. The trial court then went on to conclude that the evidence would have been admissible as a prior consistent statement. The trial court denied defendant's motion for a new trial in a December 18, 2015 order.

## II. JUDICIAL BIAS

Defendant first argues that the trial court revealed its bias against defendant when questioning the prosecution's expert, Barbara Cross. Defendant maintains that the judge's questioning indicated he believed the victim lied at the first CAC interview when she denied the abuse and then told the truth at the second interview, when she claimed that she was abused. We disagree.

"The question whether judicial misconduct denied defendant a fair trial is a question of constitutional law that this Court reviews de novo." *People v Stevens*, 498 Mich 162, 168; 869 NW2d 233 (2015). Because defendant failed to object in the trial court, this Court reviews the issue for plain error affecting defendant's substantial rights. *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011).

Judicial questioning of a witness is generally appropriate under MRE 614(b) to "prevent unnecessary waste of time, or to clear up some obscurity" but "the judge should bear in mind that undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses . . .may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto." *Stevens*, 498 Mich at 174. Our Supreme Court has cautioned:

> A trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality. A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct *improperly influenced the jury* by creating the appearance of advocacy or partiality against a party. In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors including, but not limited to, the nature of the trial judge's conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions, either at the time of an

> inappropriate occurrence or at the end of trial. [*Stevens*, 498 Mich at 164 (emphasis added).]

*Stevens* has limited applicability to the case at bar, which was a bench trial. Even defendant acknowledges that *Stevens* is not "precisely on point" where it addresses "the circumstance in which the judge at a jury trial shows bias which influences the jury."

Defendant goes on to argue that even if *Stevens* has limited applicability, the trial court's bias was inherent in the questions posed. "A criminal defendant is entitled to a neutral and detached magistrate" and "[a] defendant claiming judicial bias must overcome a heavy presumption of judicial impartiality." *Jackson*, 292 Mich App at 597-598. "On jury waiver, a judge shall proceed to hear, try and determine such cause in accordance with the rules and in like manner as if such cause were being tried before a jury. In effect, the statute places the same standard of impartiality on the judge as the constitution places on the jury." *People v Walker*, 24 Mich App 360, 361; 180 NW2d 193 (1970) aff'd 385 Mich 596; 189 NW2d 41 (1971) (internal quotation marks omitted).

After direct and cross-examination, the trial court had the following exchange with Cross:

> THE COURT: . . . I have several questions and since it's a bench trial I think I'm probably at liberty to ask them.
>
> ***
>
> Okay. Ms. Cross it's kind of a delight to have you here like this because usually I do have to muzzle myself a little when we have a jury trial but let me ask you this. There is some testimony there that the victim lied the first time she met with anybody at the [CAC]. Tell me about that?
>
> THE WITNESS: I didn't see a fabrication.
>
> THE COURT: Well I understand. I want you to assume. You're an expert. So I'm saying, I want you to assume that there is some evidence that she lied. I mean, assume that's true.
>
> THE WITNESS: All right. That could either be because it didn't happen which is fairly rare because why would a child and how would a child know all that information to be able to orchestrate and spin such a story. But, the flip side to that is what I testified to earlier, that children are fairly protective, especially if the person lives in the home and they're emotionally attached to the person. They don't want this to come out. Again, not because they like what's going on but because they're smart enough to know that it's gonna effect [sic] the family adversely.
>
> THE COURT: How often does that happen? That a child lies about it the first time that person's interviewed by, you know, some governmental type person?

THE WITNESS: Well, Judge, I don't know the statistics about how often a child would out and out lie because I'm assuming –

THE COURT: Well, so far you've used words like usually and mostly and stuff like that. That's all I'm looking for. I'm not looking for a number.

THE WITNESS: Well a lie can mean different things. I mean there's a partial –

THE COURT: Well I want you to assume we have a flat out lie.

THE WITNESS: Oh, okay. All right. Then that means the child doesn't want anyone to know. The bottom line, is that they don't want anyone to know and typically it's because they don't want the offender to get in trouble and they don't want mom to be upset with them.

THE COURT: Now does that answer change if I told you mom took the child to the [CAC]?

THE WITNESS: You mean are you –

THE COURT: So in other words, let's assume that mom is at least mildly supportive because she's taken the child to the authority and then the child tells a flat out lie as, you know, I mean, I'm using lie carefully because I need to make some decisions here.

THE WITNESS: To me, that would look as if the child was trying to protect the family members.

THE COURT: All right, thank you.

Contrary to defendant's assertion, the trial court, in questioning Cross, did not "reveal its preconceived belief that the victim lied at the first interview when she denied the abuse, then told the truth at the second interview, when she claimed that she was abused." Instead, the trial court posed a hypothetical to Cross in order to determine why a child might initially deny abuse and then subsequently offer a conflicting statement. "When the credibility of the particular victim is attacked by a defendant, . . .it is proper to allow an explanation by a qualified expert regarding the consistencies between the behavior of that victim and other victims of child sexual abuse." *People v Peterson*, 450 Mich 349, 375; 537 NW2d 857 (1995). This was a proper inquiry because the trial court was the trier of fact. The trial court did not have preconceived beliefs, but was only attempting to assess credibility. Defendant was not denied a fair and impartial trial.

## III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that trial counsel was ineffective for failing to introduce evidence that the victim's statement at the bonfire was not spontaneous and in failing to object to hearsay testimony about that statement. We disagree.

"Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. A judge must first find the facts and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). "The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

"To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003), citing *Strickland v Washington,* 466 US 668, 687; 104 S Ct 2052; 80 L Ed2d 674 (1984); *People v Pickens,* 446 Mich 298, 302-303, 521 NW2d 797 (1994).

At the *Ginther* hearing, trial counsel Mary Farrell explained her trial strategy:

> My theory of the case and in discussion with Mr. Holman was that this victim was fabricating these allegations and that she had made a number of statements that were conflicting with each other throughout her relationship with Mr. Holman regarding whether or not he had done anything inappropriate to her in the way of touching her. So there were a couple of different statements that she had made at different times and the theory was to show that she would say things about Mr. Holman when – I don't want to say when it was convenient for her. But there were some adults in her life that were kind of prodding her to go this way, to make these allegations against Mr. Holman. And when those adults were not a big part of her life that's when she would recant and say that nothing happened. And then when Mr. Holman was removed from her life she would again make allegations regarding his inappropriate behavior with her.

Farrell did not believe that the victim's bonfire statement was the result of questioning by her mother. However, after reviewing the police report at the *Ginther* hearing, Farrell acknowledged that the victim made the remarks only after Kinney specifically talked to her about the allegations.[5] Farrell had previously assumed that the victim overheard her mother talking to someone else.

[5] The January 19, 2013 police report indicated:

> Kinney told me that Michael Holman, the suspect in this CSC took a lie detector test this week. He reported to Kinney that he failed one question. Kinney was talking to [the victim] about this and explaining that Holman failed a question. She told [the victim] that Holman failed the question ["]Do you become aroused when Byler is laying on top of you?["] Kinney said that she explained to [the

Farrell explained she did not object to Kinney's testimony about the victim's bonfire statement because "part of our trial strategy was to show these different and inconsistent statements that the victim had made and what [Kinney] testified to on the second day of trial had already been testified to by the victim on the first day of trial." In fact, Farrell was the one that introduced the bonfire incident when she cross-examined the victim about who was the first person that the victim told about the alleged abuse. Farrell believed that the statement was admissible as a prior consistent statement.

Following the *Ginther* hearing, the trial court indicated that, in light of the police report, "[i]f the Court had been presented with the issue I think the Court would have concluded that it does not satisfy [tender years exception]." Because defense counsel introduced the evidence, the issue of whether the prosecutor gave notice was rendered moot. The trial court found that counsel's decision was reasonable in light of the theory of the case that the victim gave inconsistent statements and was being manipulated. If the bonfire statement had been excluded, then there would be no "rhythm" to defendant's argument. The trial court believed that trial counsel's use of the evidence "was calibrated to accomplish the purpose that Ms. Farrell intended. And I think it was within her judgment to make that call."

The trial court went on to say that, even if the trial court found that counsel's actions fell below the objective standards of reasonableness, there was no prejudice to defendant. The trial court reaffirmed its previous findings regarding the witnesses' credibility. The trial court added:

> So in my view this was never a close call credibility-wise. So in that respect, even if there is an error the Court finds it to be harmless. The Court cannot conclude that it is reasonably probable that but for the exclusion of this testimony the outcome of the defendant's trial may have been different. In fact when I typed my notes I really didn't make that big a deal about it as I heard the testimony beyond noting that disclosure was made then. The Court did comment on it in rendering its decision, I know that.

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> victim] that arousal meant "He thinks about having sex with you, when you are laying on top of him."
>
> Kinney told me that [the victim] then stated Momma, "I want to come out and tell you the truth. Hes [sic]been touching me."
>
> Kinney asked [the victim] "With his hand or his peepee?"
>
> [The victim] replied "Both."
>
> Kinney told me that she wanted someone else to be witness to this and she went to her sister, Stover, and told her to go ask [the victim] what [the victim] had just told Kinney. Kinney stated she had no further contact with [the victim] before the [p]olice were notified.

The trial court then went on to consider whether the evidence would have been admissible as a prior consistent statement:

> Finally, if the Court were asked to consider the question about whether it was a prior consistent statement the Court would have admitted it rightly or wrongly as such. The statement was made, back to my chart for a minute, on or about January 19th. We have a statement January 23 at the [CAC]; we have a statement sometime later where she admitted she was mad and she wanted to get even with Mr. Holman so I think that in the face of those types of things the statement going back to January 19th in my view would have been admitted as a prior consistent statement.

Defendant's claim that the victim's statement did not qualify as a prior consistent statement has nothing to do with defendant's ineffective assistance of counsel claim; rather, defendant appears to quibble with the trial court's determination that the statement would have been admissible as a prior consistent statement. In essence, defendant's ineffective assistance of counsel claim has morphed into a claim of evidentiary error. The trial court indicated that it would have deemed the statement to be admissible as a prior consistent statement, even if that decision was erroneous. Therefore, although defendant attacks admissibility under MRE 801(d)(1)(B), the trial court indicated it would have allowed the statement and "[f]ailing to . . .raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

Regardless of whether the statement was admissible as a prior consistent statement, defendant has failed to demonstrate that he received ineffective assistance of counsel when counsel opened the door to the victim's bonfire statement. As was learned at the *Ginther* hearing, defense counsel had a sound basis for pursuing that line of questioning and later failing to object to the prosecution's examination of Kinney. In effect, defense counsel hoped to show that the victim's testimony was not credible because she had given inconsistent statements in the past. "That the strategy . . .ultimately failed does not constitute ineffective assistance of counsel." *People v Kevorkian*, 248 Mich App 373, 414-15; 639 NW2d 291 (2001). In fact, as the trial court noted, even if this case was considered a strict credibility contest between the victim and defendant, it was not a close call as to whom to believe. As such, even if defense counsel's decision to question the victim about telling Kinney about the abuse and counsel's later failure to object to Kinney's testimony could be deemed below the objective standard of reasonableness, defendant has failed to demonstrate that he was prejudiced by counsel's actions.

## IV. PROSECUTORIAL ERROR

Defendant next argues that he was denied a fair and impartial trial when the prosecutor falsely indicated that defendant had previously admitted sexual contact with the victim. We disagree.

"This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Because there was no contemporaneous objection or request for a curative instruction, this Court's review "is limited to

ascertaining whether plain error affected defendant's substantial rights." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

"A prosecutor may not make a statement of fact . . .that is not supported by evidence presented at trial." *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008).

During rebuttal argument, the prosecutor commented on defendant's credibility:

> He also testified that he never touched her vaginal area. But yet he told, I can't think of his first name, Howard Slovash, [sic, Howard Swabash] that when he bathed her, he rubbed, he cleaned her vaginal area. He's not consistent on his statements. He's not consistent on his story.

Although it was not clear at the time of trial who Swabash was, the trial court indicated at the *Ginther* hearing that he understood that Swabash was the individual who had conducted defendant's lie detector test.

It does not appear that any alleged error affected the trial court's verdict. "In a bench trial, the trial court is presumed to know the applicable law." *People v Lanzo Constr Co*, 272 Mich App 470, 484; 726 NW2d 746 (2006). "A judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." *People v Jones,* 168 Mich App 191, 194; 423 NW2d 614 (1988). Where "the trial court found defendant guilty on the basis of other, properly admitted evidence" and where "the trial court's decision was not affected by the disputed testimony, defendant has not shown that any error substantially affected his rights and, therefore, his claim must fail." *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001).

## V. DEFENDANT'S STANDARD 4 BRIEF

### A. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence was insufficient to support his convictions. We disagree.

On an appeal from a bench trial, this Court reviews challenges to the sufficiency of the evidence de novo. *Lanzo Constr Co,* 272 Mich App at 473. "[T]his Court must review the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Harmon,* 248 Mich App 522, 524; 640 NW2d 314 (2001). In addition, in a bench trial, the trial court's findings of fact are reviewed for clear error. *Lanzo Constr Co,* 272 Mich App at 473.

To prove CSC-I under MCL 750.520b(1)(a), the prosecution was required to show that defendant engaged in sexual penetration with another person under the age of thirteen. "Sexual penetration" means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). To prove CSC-II under MCL 750.520c(1)(a), the prosecution was required to show that

defendant engaged in sexual contact with another person under the age of thirteen. "'Sexual contact'" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for: (i) revenge; (ii) to inflict humiliation; (iii) out of anger." MCL 750.520a(q). Pursuant to MCL 750.520h, "[t]he testimony of a victim need not be corroborated in prosecutions under sections [MCL 750.]520b to 520g" and "the testimony of complainant alone [may be] sufficient evidence to establish defendant's guilt beyond a reasonable doubt." *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

The trial court noted that the prosecutor had proven each of the three charged crimes beyond a reasonable doubt:

> Let me say this right up front. The prosecutor can prove his case solely based on the testimony of the victim if that . . .testimony shows guilt or proves guilt beyond a reasonable doubt. Her testimony along with a little bit of help from some other folks gets us over the bar. Gets the prosecutor, not us, gets the prosecutor over that bar. The critical testimony about Mr. Holman committing these crimes does come from the victim here.

The victim testified that on separate occasions defendant put his tongue on her vagina, put his hand on her vagina and tried to put his penis in her vagina.

Defendant challenges only the veracity of the witnesses, but "[t]his Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). "[W]hen testimony is in direct conflict and testimony supporting the verdict has been impeached, if it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the [trier of act] could not believe it, the credibility of witnesses is for the [trier of fact]." *People v Lemmon*, 456 Mich 625, 643; 576 NW2d 129 (1998).

This Court must defer to the trial court as the finder of fact that the victim's testimony, standing alone, was sufficient to support defendant's convictions. While defendant complains about the lack of detail in the victim's testimony, Cross testified that the abuse almost always occurs more than once and it was not unusual for a child to be unable to remember locations and dates, but still be able to recall the facts of the actual abuse. There is simply no reason to disturb the trial court's verdict.

## B. GREAT WEIGHT OF THE EVIDENCE

Defendant next argues that, even if the Court determines that there is no need to reverse for lack of sufficient evidence, reversal is supported on the lesser standard of against the great weight of the evidence. We disagree.

"A trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a

miscarriage of justice to allow the verdict to stand. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008).

"Conflicting testimony and questions of witness credibility are generally insufficient grounds for granting a new trial. Absent exceptional circumstances, issues of witness credibility are for the trier of fact. The hurdle that a judge must clear in order to overrule a jury and grant a new trial is unquestionably among the highest in our law." *Unger*, 278 Mich App at 232. Because this case was tried without a jury, defendant asks the trial court to put itself in the untenable position of granting a new trial for its own failure to properly weigh the evidence. Once again, because issues of credibility are for the trier of fact, the verdict was not against the great weight of the evidence.

### C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that trial counsel was ineffective for failing to secure an expert witness and for failing to file a motion for a pre-trial "taint" hearing. We disagree.

#### 1. FAILURE TO SECURE EXPERT WITNESS

MCL 775.15 provides:

> If any person accused of any crime or misdemeanor, and about to be tried therefor in any court of record in this state, shall make it appear to the satisfaction of the judge presiding over the court wherein such trial is to be had, by his own oath, or otherwise, that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial, giving the name and place of residence of such witness, and that such accused person is poor and has not and cannot obtain the means to procure the attendance of such witness at the place of trial, the judge in his discretion may, at a time when the prosecuting officer of the county is present, make an order that a subpoena be issued from such court for such witness in his favor, and that it be served by the proper officer of the court. And it shall be the duty of such officer to serve such subpoena, and of the witness or witnesses named therein to attend the trial, and the officer serving such subpoena shall be paid therefor, and the witness therein named shall be paid for attending such trial, in the same manner as if such witness or witnesses had been subpoenaed in behalf of the people.

"To obtain appointment of an expert, an indigent defendant must demonstrate a nexus between the facts of the case and the need for an expert. It is not enough for the defendant to show a mere possibility of assistance from the requested expert." *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006) (internal citation omitted).

Nothing in the record demonstrates that an expert was necessary for defendant to safely proceed to trial. Defense counsel was able to challenge the victim's accusations through cross-examination. Therefore, defendant cannot show that defense counsel was ineffective for failing to retain an expert, or that he was prejudiced by the absence of the expert at trial.

#### 2. FAILURE TO REQUEST A "TAINT" HEARING

Defendant fails to cite to any Michigan statute, court rule, or rule of evidence that requires or sets forth procedure for conducting a taint hearing in cases alleging sexual abuse of a minor and defense counsel cannot be deemed ineffective for failing to advance a novel legal argument. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996). Additionally, under the rules of evidence, a trial court may exclude the testimony of a witness if that witness if found incompetent under MRE 601, which provides:

> Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

Here, the trial court questioned the victim about the difference between telling the truth and telling a lie and was confident that the victim was a competent witness. Once again, the credibility of the witnesses, including the alleged victim, is then for the trier of fact to decide. Moreover, defense counsel addressed the issue through cross-examination.

## D. JUDICIAL BIAS AND PROSECUTORIAL MISCONDUCT

Finally, defendant argues that the judge abused his discretion in playing the role of the prosecutor when questioning witnesses and demonstrated a bias against defendant because of the nature of the case. Defendant adds that the prosecutor committed misconduct when it continuously used leading questions when examining the witnesses and misrepresented the facts when it argued in closing argument. For the most part, these issues have already been addressed in Sections II and IV of this opinion.

"[A] judge's discretion to [question witnesses] is greater in bench trials than in trials before juries." *People v Meatte*, 98 Mich App 74, 78; 296 NW2d 190 (1980). We have reviewed the transcript thoroughly and the trial court did not excessively question any of the witnesses, nor did it demonstrate bias against defendant.

As to defendant's claim of prosecutorial misconduct, defendant quibbles with how the prosecutor presented the evidence. "Generally, prosecutors are accorded great latitude regarding their arguments and conduct. They are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal quotation marks and citations omitted). We find no error.

Affirmed.

/s/ Colleen A. O'Brien
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood